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IN THE

Supreme Court Of The United States

John R. Moseley ..... *Petitioner*

V.

The United States of America ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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STATEMENT OF THE CASE

The Petitioner in this case, John R. Moseley, was indicted by the Grand Jury of Pulaski County, Arkansas, on June 2, 1973, charging him with the violation of Act 590 of the Acts of the State of Arkansas for the year 1971. §82-2601 *Ark. Stats. Anno.* (1967 Repl. Supp.), in that he delivered a controlled substance proscribed by the cited Statute.

The petitioner was convicted by a jury on August 15, 1973, of the charge of violating Arkansas's Controlled Substance Act.

On September 7, 1973, the Grand Jury for the Eastern District of Arkansas, Western Division, indicted the Petitioner, charging him with the violation of 18

U.S.C. §641, in that he embezzled and converted to his own use certain drugs, to-wit: morphine, Dilaudid, and cocaine phosphate, and Petitioner was convicted in a trial before the Court without a jury. Moseley prosecuted his appeal from the conviction in the Federal District Court on the charge of violation of the Federal Statute hereinabove cited, asserting that there was insufficient evidence to sustain a conviction.

On November 7, 1974, the United States Court of Appeals for the Eighth Circuit affirmed the conviction. (See Appendix A.) A petition for rehearing was duly filed and denied by order of the Circuit Court of Appeals on November 27, 1974. (See Appendix B.)

PETITION

The Circuit Court of Appeals erred in permitting a conviction based upon the indulgence of the Court upon a presumption on a presumption or an inference on an inference, as proscribed by the rules as set forth in the case of *United States v. Ross*, 92 US 281, 23 L.Ed. 707 (1875).

The reasoning in order to sustain a conviction in this case must be as follows: The Government proved by direct evidence that Moseley was the Chief Pharmacist at the Veterans Administration; that Moseley had access to the narcotic drugs kept in the pharmacy; that Moseley initiated and approved orders for narcotic drugs; that certain narcotic drugs, including the drug Dilaudid were missing from the V.A. Pharmacy, the value of which exceed $100.00. It could be inferred circumstantially from this direct evidence then, that Moseley took the drugs that the Government proved were missing. Since Moseley as

Chief Pharmacist lawfully had possession and control of these drugs, no offense had been committed by this proof. The Government must further prove, not only that he took the drugs, but that he converted them to his own use by the sale thereof or by using them himself.

In order to make this proof, the witness Morgan was called. He testified that at one point in time, he purchased from Moseley certain drugs, including the drug Dilaudid. It must then be inferred from this testimony that the drugs purchased by Morgan from Moseley were the same drugs that Moseley took from the pharmacy, which taking was inferred itself from the circumstances of Moseley's relationship with the pharmacy. This inference upon an inference is not permitted.

The conviction of Moseley, therefore, is based upon the evidence and procedure condemned by this Court in *Ross, supra.*

Wherefore, petitioner prays that this Court issue its Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, and after review thereof, the cause be reversed for the reasons indicated.

Respectfully submitted

JAMES R. HOWARD
106 East Capitol

Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 73-1903

United States of America,
Appellee,

v.

Appeal from the United States District Court for the Eastern District of Arkansas.

John R. Moseley,
Appellant.

Submitted: October 15, 1974.

Filed: November 7, 1974.

Before VOGEL, Senior Circuit Judge, and LAY and STEPHENSON, Circuit Judges.

PER CURIAM.

John R. Moseley was convicted of embezzling government property in violation of 18 U.S.C. §641. On appeal he challenges the sufficiency of the evidence to sustain the conviction. We affirm.

From August 1970 through September 1972 Moseley was employed as the Chief of Pharmacy Services at the Veterans Administration Hospital in Little Rock, Arkansas. The alleged embezzlements occurred during that time period and involved several narcotic drugs, including morphine sulfate, Dilaudid and codeine phosphate. The defendant pled not guilty and the matter was tried to the court, the Honorable J. Smith Henley presiding, on partially stipulated facts. The stipulated facts were:

(1) The defendant was Chief of Pharmacy Services at the Little Rock Veterans Administration Hospital during the time period in question;
(2) The pharmacy records had been inventoried subsequent to his departure from that position at which time they indicated the following drugs were missing and unaccounted for:

   (a) 10,825 tablets of Dilaudid (.002 grams);
   (b) 10,080 tablets of Dilaudid (.004 grams);
   (c) 500 tablets of morphine sulfate (1/6 grain); and
   (d) 1,051 tablets of morphine sulfate (.010 grams);

(3) Several irregularities were present in the VA records; and
(4) The defendant had signed nine receiving forms.

At trial the government produced several pharmacy employees who testified to the defendant's access to the drugs in question and to their approximate value. At least one witness testified that he had seen the defendant take drugs from the shelf and place them in a paper sack. There was evidence concerning the relative infrequency with

which these drugs were used because of their narcotic nature. The government also called Albert Morgan, who testified to purchasing large quantities of Dilaudid from the defendant, and H. L. Walters, an undercover policeman who testified to a purchase of an amphetamine drug (apparently not one of those allegedly taken by the defendant) from the defendant. The defendant's case consisted of cross-examination intended to demonstrate the poor record-keeping practices at the VA hospitals, the accessibility of the drug safe to others and the practice of destroying certain drugs at certain intervals. He also called a member of th VA staff who testified on these same general topics.

The defendant's basic argument is that he had a right as Chief of Pharmacy Services to possess and control these drugs and therefore the government must also prove that he sold the drugs to establish a violation of §641. He argues that the government failed to prove a sale of government property since that fact may only be inferred after first inferring his wrongful conversion of the drugs. We disagree. This argument conveniently misconstrues the statute as well as the evidence before us.

The indictment charged in the language of the statute that the defendant "willfully and knowingly did embezzle and convert to his own use" certain specified government property in violation of 18 U.S.C. §641. The defendant's challenge is mistakenly based upon a belief that the government was required to demonstrate a sale to prove embezzlement and conversion. This is not the case. *See Morissette v. United States*, 342 U.S. 246, 271-72 (1952).

In *Hawkins v. United States*, 458 F. 2d 1153 (5th Cir. 1972), the court relied upon *Morissette* in observing that the crime of conversion contained in §641 did not require a sale. It said:

> It is clear that conversion does not require a sale, inasmuch as the gist of the offense of conversion is wrongfully depriving an owner of his property whether or not it is sold.
>
> *Morissette v. United States*, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952). Having once been converted however, the property is then subject to an entirely separate offense when it is sold, requiring a separate order of proof from that required in conversion. *Albrecht v. United States*, 273 U.S. 1, 47 S. Ct. 250, 71 L. Ed. 505 (1927); *Thomas v. United States*, 249 F. 2d 429 (9th Cir. 1957). Therefore, as a matter of law, the offense of conversion and the offense of sale can be two separate and distinct offenses under 18 U.S.C. §641.
>
> *Id.* at 1155.

Similarly, the crime of embezzlement requires only proof of the wrongful taking. There was sufficient evidence of this culpable fact. Where, as here, there is a substantial shortage in property committed to the possession of the defendant, and in fact acquired in the first instance at his request, and no plausible explanation of the shortage is tendered by the defendant, the trier of fact may reasonably infer from the circumstances that the custodian of the property has embezzled or converted it. *See United States v. Powell*, 413 F. 2d 1037 (4th Cir. 1969); *O'Malley v. United States*, 378 F. 2d 401 (1st Cir.), *cert. denied*, 389 U.S. 1008 (1967).

However, assuming that evidence of a sale was essential to the government's case, the proof of this fact rests upon evidence independent of the wrongful taking. Morgan's testimony established a direct sale of a large quantity of Dilaudid. The court could infer from this testimony, along with all the other facts and attendant circumstances, that Moseley was wrongfully converting the drugs through unauthorized sales.

Judgment affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 73-1903. September Term, 1974

The Unites States,
Appellee,
vs.
John R. Moseley,
Appellant.

Appeal from the United States District Court for the Eastern District of Arkansas.

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

November 27, 1974

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-800

JOHN R. MOSELEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the evidence was insufficient to support his conviction.

After a jury-waived trial in the United States District Court for the Eastern District of Arkansas, petitioner was convicted of embezzling government property and converting it to his own use, in violation of 18 U.S.C. 641.[1] He was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. A) in an opinion that is not yet reported.

[1] 18 U.S.C. 641 provides in pertinent part:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof * * *
>
> [shall be guilty of an offense].

1. The evidence at trial showed that petitioner was employed as the Chief of Pharmacy Services by the Veterans Administration Hospital in Little Rock, Arkansas, from August 1970 through September 1972 (Tr. 6-7). An inventory of pharmacy records conducted after petitioner's departure disclosed a substantial shortage of narcotic drugs.[2]

As Chief Pharmacist, petitioner had access to the narcotic drugs stored in the pharmacy's safe. Although any pharmacist could initiate orders for such drugs, each request required approval by petitioner or his assistant (Tr. 11). The evidence showed further that each of the requests at issue herein was approved by petitioner (Gov't. Exhs. 1-9).[3]

The perpetual inventory[4] for September 1968 through June 1973 indicated that the pharmacy had received only fifty-nine bottles of Dilaudid; the drug request forms, however, disclosed that petitioner had personally received ninety bottles of this drug during the period from August 1970 through September 1972 (Tr. 18-23; Gov't. Exhs.

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[2]As stipulated by the parties, the inventory uncovered a shortage of the following drugs: 10,825 tablets of Dilaudid (.002 grams); 10,080 tablets of Dilaudid (.004 grams); 500 tablets of morphine sulfate (1/6 grain); and 1,051 tablets of morphine sulfate (.010 grams) (Tr. 55). See Pet. App. A, p. 5.

[3]The request forms also disclose that petitioner received the drugs when they were delivered by Supply, a separate division of the hospital.

[4]A perpetual inventory, which reflected all receipts and disbursements of each drug, was kept by the pharmacy (Tr. 13-17).

1-9).[5] According to one order form, petitioner had personally received forty-eight bottles of Dilaudid in a single delivery on July 12, 1971, but this receipt was never recorded in the perpetual inventory (Tr. 60-61; Gov't. Exhs. 4, 10-11).[6] The largest single amount of Dilaudid ever recorded in the inventory was six bottles (Tr. 20-23), and the pharmacist whose signature appeared on the order form as the initiator of the request for forty-eight bottles was certain that he had never placed such a large order (Tr. 60-61).

Albert Morgan, a former employee at the hospital, testified that he had purchased both Seconal and Dilaudid from petitioner (Tr. 73-76). Specifically, he testified that during 1971 and 1972 he purchased without a prescription, once or twice weekly, numerous bottles of Dilaudid for $400 each (Tr. 74-76). Petitioner at one time warned him that the drug had become more difficult to obtain because the hospital had hired new personnel (Tr. 78). H. L. Walters, an undercover agent who had been introduced to petitioner by Morgan, also purchased some "reds" (Seconal) from petitioner (Tr. 94-98).

Petitioner's defense consisted primarily of cross-examination of the witnesses in an effort to establish the accessibility of the safe where the narcotics were stored, the

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[5]A statement that the pharmacy had received fifty-nine bottles of Dilaudid during this period is not entirely accurate, because the inventory sheet which covered the period from July 1969 to May 1970 could not be located (Tr. 21). Nevertheless, these hospital records indicate the amount of the drug which was customarily available in the pharmacy.

[6]As noted, the perpetual inventory was incomplete because the inventory sheet which covered the period from July 1969 to May 1970 could not be located. See note 5, *supra*. However, petitioner's subsequent receipt of forty-eight bottles on July 12, 1971, should have appeared in the inventory, but it did not.

inaccuracy of the hospital records, and the hospital's practice of periodically destroying drugs.

2. We submit that the evidence, as outlined herein, was sufficient to support petitioner's conviction. Petitioner's contention that his conviction resulted from an improper inference on an inference was rejected by the court of appeals in a thorough opinion upon which we rely. The court correctly reasoned (Pet. App. A, pp. 6-8):

> The defendant's basic argument is that he had a right as Chief of Pharmacy Services to possess and control these drugs and therefore the government must also prove that he sold the drugs to establish a violation of §641. He argues that the government failed to prove a sale of government property since that fact may only be inferred after first inferring his wrongful conversion of the drugs. We disagree. This argument conveniently misconstrues the statute as well as the evidence before us.
>
> The indictment charged in the language of the statute that the defendant "willfully and knowingly did embezzle and convert to his own use" certain specified government property in violation of 18 U.S.C. §641. The defendant's challenge is mistakenly based upon a belief that the government was required to demonstrate a sale to prove embezzlement and conversion. This is not the case. See *Morissette* v. *United States*, 342 U.S. 246, 271-72 (1952).
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> Similarly, the crime of embezzlement requires only proof of the wrongful taking. There was sufficient evidence of this culpable fact. Where, as here, there

is a substantial shortage in property committed to the possession of the defendant, and in fact acquired in the first instance at his request, and no plausible explanation of the shortage is tendered by the defendant, the trier of fact may reasonably infer from the circumstances that the custodian of the property has embezzled or converted it. See *United States* v. *Powell*, 413 F.2d 1037 (4th Cir. 1969); *O'Malley* v. *United States*, 378 F.2d 401 (1st Cir.), cert. denied, 389 U.S. 1008 (1967).

However, assuming that evidence of a sale was essential to the government's case, the proof of this fact rests upon evidence independent of the wrongful taking. Morgan's testimony established a direct sale of a large quantity of Dilaudid. The court could infer from this testimony, along with all the other facts and attendant circumstances, that Moseley was wrongfully converting the drugs through unauthorized sales.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.